6. FCC Actions/ Inaction and Discriminatory Effects

Since the enactment of the Communications Act of 1934, the FCC has regulated the allocation methods and use of the radio spectrum. The FCC has used three primary methods to allocate a license when two or more mutually exclusive applicants have applied:

1) Comparative Hearings: An FCC proceeding, presided over by an Administrative Law Judge (ALJ), to determine, which broadcast applicant was 'best qualified' to hold the license. The 1965 Policy Statement on Broadcast Comparative Hearings defined the two primary objectives of comparative hearings to be: first, 'the best practicable service to the public' and second, 'maximum diffusion of control of the media for mass communications.' See Policy Statement on Broadcast Comparative Hearings, 1 F.C.C. 2d 393 (1965). The FCC provided seven criteria to the Administrative Law Judges (ALJs) upon which they should decide the comparative merit of the competing applicants:

   (i) Diversification of control of the media of mass communications;
   (ii) Full-time participation in station operation by owners;
   (iii) Proposed program service;
   (iv) Past broadcast record;
   (v) Efficient use of frequency;
   (vi) Character; and
   (vii) Other factors.

   In 1978, the FCC observed a continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry and issued the Statement of Policy on Minority Ownership of Broadcasting Facilities, which formalized the use of minority and gender credits in comparative hearings. 68 F.C.C. 2d 979, 982 (1978). The FCC extended the credit to women owners in Mid-Florida Television Corp., 70 F.C.C.2d 281 (Rev. Bd. 1978), set aside on other grounds, 87 F.C.C. 2d 203 (1981). In 1992, the D.C. Circuit held that the FCC's use of gender integration as a "plus factor" in comparative hearings was unconstitutional. In 1993, the DC Circuit held that the integration credit of the FCC's comparative hearing criteria was arbitrary and capricious. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). In 1994, as a consequence of the Bechtel decision, the FCC suspended all active comparative hearings. In 1995, the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision making must serve a compelling governmental interest such as remedying past discrimination and must be narrowly tailored to serve that interest. Adarand v. Pena, 515 U.S. 200 (1995);

2) Lotteries: In 1982, Congress enacted Section 309(i) of the Communications Act of 1934 to allow the FCC to select licensees by random selection. 47 U.S.C. §309(i). Section 309(i) also required the FCC to establish incentives, rules and procedures ensuring a "significant preference" for minority-controlled applicants in awarding

licenses by lottery. 47 U.S.C. §309(i)(3)(A); 47 C.F.R.§ 1.1622 The FCC used this section to award wireless licenses for cellular, specialized mobile radio, and low power TV. As Part of the Omnibus Budget Reconciliation Act of 1993, Congress limited the use of random selections to "applications accepted for filing" by the FCC before July 26, 1993, and Section 309(i) required an FCC determination that the use of the communications spectrum is not to be distributed by auction. 47 U.S.C. §309(i)(1)(B). In 1997, Congress enacted legislation that caused §309(i) to expire effective July 1, 1997 except for the award of licenses and permits for public, noncommercial television stations. Pub.L. No. 105-33, 111 Stat. 251 (1997) §3002(1)(2) and;

3) Auctions: Section 309(j) allows the FCC to select licensees by auction. Section 309(j)(3)(B) instructed the FCC to establish competitive bidding procedures that would "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people...disseminating licenses among...businesses owned by members of minority groups and women...." 47 U.S.C. §309(j)(3)(B). Again in section 309(j)(4)(C)(ii), Congress requires the FCC, in prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses...and businesses owned by members of minority groups and women." 47 U.S.C. §399(j)(4)(C)(ii). In creating these opportunities, Section 309(j)(4)(C)(ii) suggests that the FCC consider using "tax certificates, bidding preferences, and other procedures." 47 U.S.C. §309(j)(4)(C)(ii).

Each method of license allocation had advantages and disadvantages. Both comparative hearings and auctions are expensive. The comparative-hearing process often cost hundreds of thousands of dollars in legal and engineering fees. Like many legal proceedings, the comparative hearing process often was prolonged. Members of the communications industry sometimes either engaged in predatory practices towards minority and women broadcast applicants or abused the minority and women ownership program by adding minority or women "fronts" to their applications.

Acquiring a wireless license through the auction process is a costly venture, as well, especially when one adds in the cost of building out the wireless system. Wireless licenses obtained through auction can therefore cost considerably more than those licenses acquired through comparative hearings.

The nature and excitement of the auction process, especially in the entrepreneurs' C-block auction with its small business bidding credits and numerous delays, tempted and encouraged those with less experience in the industry to "overbid" for their licenses, thus rendering many business plans unworkable and unattractive as a financing opportunity. In contrast, the lottery process was the most cost effective allocation process from the standpoint of the licensee, but given its randomness, it did not necessarily allocate the license to the most "qualified," or to those interested in providing services that would best serve the public interest. However, the lottery process was effective in allocating a representative proportion of low power television licenses to minority-owned businesses.

For each method of license allocation, the FCC has instituted policies, programs and rules which attempted to increase opportunities for small, minority and women applicants in the acquisition of broadcast and wireless licenses. For instance, in the comparative hearing process, the FCC provided extra credit to those applications with participation by women and minorities. In the lottery process, the FCC provided minority applicants with a mechanism for additional participation in those licenses that they attempted to acquire. In the auction process, the FCC established bidding credits, installment payments and discounted interest rates that had some benefit for small, minority- and women-owned businesses.

Two other FCC programs attempted to increase opportunities for minority-owned businesses in the secondary market transactions, i.e., the minority tax certificate program and the distress sale program. In 1978, the FCC implemented the minority tax certificate[32] policy, which provided incentives to owners of existing broadcast properties to sell the properties to minorities.[33] The tax certificate program allowed the seller of a broadcast property to defer any gain realized on the sale if the property was sold to a minority purchaser, and the gain was rolled over into a qualified replacement broadcast property.

Congress repealed the tax certificate program for minorities in an appropriations rider to the Self Employed Persons Health Care Extension Act of 1995.[34] The legislative history of this rider demonstrates that Congress believed the certificate program constituted bad tax policy.[35]

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[32] In 1981, Congress amended section 309(j) of The Communications Act and granted discretion to the FCC to award broadcast licenses by lottery. Subsequently, the FCC claimed that the lottery statute was too vague and declined to implement such an allocation scheme. After the FCC requested a statutory mandate with greater specificity, Congress responded in 1982 by passing subsection 309(i)(C)(ii), which specified Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders constituting a minority group. Thereafter, the FCC interpreted section 309 as precluding women from being included as minorities under lotteries; and thus not entitled to a preference. In re-Amendment of the Commission's Rules to allow the Selection from among Certain Competing Applications Using Random Selection or lotteries Instead of Comparative Hearing, 58 RR 2d 1077 (1985). Accord *Pappas v. FCC*, 807 F. 2d 1019 (D.C Cir. 1986).

[33] 1978 Policy Statement, 68 F.C.C 2d 979; Commission Policies Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849 (1982), proceeding terminated, 99 F.C.C. 2d 1249 (1985).

[34] 109 Stat. 93 (1995), Pub. L. No. 1044-7 (1995).

[35] For instance, Congress believed that the policy evolved far beyond what Congress originally contemplated, and that the FCC granted the certificates routinely for a wide range of communications properties *Id.* Moreover, Congress found that the FCC had developed no standard for issuing the certificates and that grants "frequently resulted in transitory minority ownership of broadcast properties." See Greg Forster; *Tax Breaks for Being Black*, The Wall Street Journal at A21 (Jan. 8, 1995; *but* see *Testimony, Minority Tax Preferences*, Statement of William Kennard, General Counsel of the Federal Communications Commission, Before U.S. Senate Committee on Finance, 1995 Westlaw 93492 (F.D.C.H.) (Jan. 27, 19995); Statement of

However, the tax certificate program was a very effective means of disseminating broadcast licenses to minority-owned businesses. Prior to 1978, minorities owned approximately 40 broadcast licenses, one half of one percent of approximately 8,500 total broadcast license by the Commission. From 1978 to 1995, the FCC granted approximately 356 tax certificates to promote minority broadcast and cable ownership (287 radio, 40 TV and 30 cable licenses). This helped give a much needed boost for minority ownership. In 1982, the tax certificate program was expanded to cable systems. As noted above, Congress subsequently eliminated the tax certificate program.[36]

In 1978, the FCC implemented the distress sale policy, which allowed a broadcast licensee whose license has been designated for a revocation hearing to sell its station to a minority-controlled entity at 75% or less of the station's fair-market value. Underlying the distress sale policy was the dearth of minority ownership. Although highly effective, the FCC rarely used the distress sale program. In fact, in seventeen years, approximately 48 licenses were transferred to minority-owned business through the distress sale program. The distress sale policy still technically exists but its constitutionality is in question since Adarand.[37] There were instances in which these programs worked well and others in which they were abused.

In 1969, the FCC issued the Nondiscriminatory Employment Policy, which forbade discrimination on the basis of race, gender, color, religion, or national origin in employment practice by licensees of commercial or noncommercial broadcast stations. To ensure compliance, the FCC required each broadcast station to establish a proactive equal employment opportunity program. In 1998, the DC Circuit Court held that the FCC's equal opportunity rules were unconstitutional on equal protection grounds. See Lutheran Church-Missouri Synod v. FCC, F. 3d (D.C. Cir. 1998). The FCC promulgated new rules that focus on outreach, which are now also subject to constitutional challenge. Despite the fact that the FCC Nondiscriminatory Policy is the most longstanding of the FCC's rules in the area of equal opportunity, many of the interviewees believe that the FCC has unevenly enforced these rules. They see this lack of

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William Kennard, General Counsel of the Federal Communications Commission, Hearing Before the Subcommittee On Oversight of the Committee on Ways And Means, House of Representatives, 1995 Westlaw 30799 (F.D.C.H.) (Jan.27, 1995) thus frustrating the stated goal of encouraging minority ownership, 109 Stat. 93 (1995), Pub. L. No. 1044-7 (1995). Congress also found that the tax certificate policy was not subject to systematic review by the IRS or any other governmental body to evaluate the cost to the government. Id. However, at least one senator was of the opinion that there was no showing of "past (or current) discrimination" to justify the tax certificate program. Senator Packwood, in describing the tax certificate program posed the following question: "Do we want a Government policy where there is no evidence of discrimination?" See *Proceedings and Debates of the 104th Congress*, 141 Cong. Rec S4532-04 Mar. 24, 1995).

[36] Self-Employed Health Insurance Act of 1995, Pub L. No. 104-7, S 2, 109 Stat. 93 (1995).

[37] The distress sale program was one of two programs explicitly upheld in Metro Broadcasting, although under intermediate scrutiny. No court has addressed the program's constitutionality under strict scrutiny since Adarand was decided.

enforcement as a missed opportunity that could have positioned more women and members of minority groups to have the kind of track record and corporate broadcast experience needed to leverage themselves into ownership opportunities. The right kind of experience can open doors to ownership opportunities, and debt and equity financing

Many people we interviewed believed that the FCC's actions, inaction, policies, and rules were not intentionally discriminatory, but the impact - the unintended consequences – allowed for discrimination by third parties against FCC licensees and applicants and clearly disadvantaged many small, minority and women licensees making them ill-positioned to compete successfully in either a deregulated broadcasting or capital-intensive wireless market.

Jerry Byrne, a White male who with his Asian partner owns wireless licenses, shared his perspective on the FCC and discrimination.

> *When [the FCC] lay[s] out rules, the rules are not discriminatory, the way they're laid out. [But] if they don't enforce the rules that they set out from the start, then there's a discriminatory process taking place. My point is this, if they want to be inclusive, they can. They can to a point. . . . But, if the rules are allowed to be broken during the process, then on its own, discrimination is taking place. (JByrne141, p.40)*

Art Gilliam, an African-American radio station owner, talks about the political influence at the FCC Commissioner level and how that might translate into discrimination on the part of the FCC.

> *No I didn't think there was discrimination—well, let's see, I don't have a perception of the FCC at its . . . staff level engaging in discrimination. I have not experienced that personally. At the same time, I think at the Commissioner level, which is an appointed level, that there is political influence that can be brought to bear down through the organization . . . (w)hich is different than discrimination, but it's discrimination in the institutionalized sense in that most [of those who] have political influence are less likely to be African American. (AGilliam117, p. 17)*

Henry Rivera, a communications attorney and former FCC Commissioner, gave us a historical perspective on a series of changes that affected minorities' opportunities to participate successfully in the acquisition of wireless and broadcast licenses.

> *. . . I think in terms of things that have happened to the minority community, clearly one of the most devastating has to have been the repeal of the Tax Certificate. I mean when we lost that, we really did lose a terrific vehicle toward increasing minority ownership. That was devastating. Secondly, we lost the Comparative Hearing Process, which awarded minorities with preferences in the Comparative Hearing Process. That was also a real blow. The Commission really doesn't designate licenses for hearing anymore. There was a policy that was called the Distress Sale Policy which benefited a broadcaster to sell his station to a minority if he had been designated for hearing. And I think that policy is still alive, but in fact there are so few licenses that are designated it*

> *really doesn't make much of a difference. Then we've had the whole series of anti-affirmative action decisions by the courts, which have hurt the FCC's EEO policy [which the] Commissioner's trying to . . . re-institute now*[38]*. But . . . this series of things that has happened [has] been extremely hard on the policy of fostering minority ownership and I think that the figures show that. They're have really not been any increases in minority ownership over these many years. (HRivera516, pp. 12-13)*

George Dobbins, an African-American wireless licensee, provided his understanding of the regulatory and market realities.

> *Many of the employees at the FCC, you know, they wanted to see some small and minority companies succeed. But it wasn't a lot at that point [after the Adarand decision] that the FCC could do, because if you don't have any advantages, I mean, the FCC couldn't do anything about it. So the thing that enabled the few, the handful of major companies that you see out there now that are successful [e.g., Radio One, Granite Broadcasting, Z Spanish] really become successful was when they had the advantages to give the opportunity to small and minority companies to get involved. If you put it out on an open playing field, it's just about impossible for some of the small Black companies out there, undercapitalized, not enough managers [adequate resources] to compete against these major players. I mean, that's the history of it and that's going to be the future of it. The history is not going to change. There's a clear-cut pattern of that, and it doesn't take a genius to figure it out. (GDobbins362, p. 6)*

(a) The FCC Does a Tough Job Well

In speaking with the study participants, many shared their frustrations, travails and disappointments in dealing with the FCC. However, several participants had kudos for the Commission, acknowledging that even in the face of the FCC's tough and complicated job, they felt well served. While the primary objective of the study was to examine market entry barriers, it is important to note the FCC's successes.

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[38]On January 20, 2000, the Commission adopted new EEO rules that emphasize broad outreach to all qualified job candidates for positions at radio, television and cable companies. The new rules prohibit discrimination on the basis of race, religion, color, national origin or gender and, require, inter alia, broadcast licensees to widely disseminate information about job openings to all segments of the community to ensure that all qualified job candidates have an opportunity to compete for positions. See In The Matter of Review of the Commission's Broadcast and Cable *Equal Employment Opportunity rules and Policies, Report and Order, MM Docket No. 98-204,* 15 FCC Rcd. 2329 (2000). The rules respond to the D.C. Circuit Court of Appeals' 1998 decision in Lutheran Church [141 F.3d 344 (D.C. Cir. 1998) which held that the Commission's previous broadcast EEO requirements were unconstitutional. The new EEO rules are also now subject to constitutional challenge, and 50 of the state broadcast associations have recently appealed their implementation. State Assns. Appeal New EEO Rules, Television Digest, Volume 40, Issue 33, Monday, August 14, 2000.

Tazbah McCullah, a Navajo woman who oversees the operation of a tribal-owned commercial radio station shares her experience with the FCC.

> *The [FCC] ha[s] never hindered our efforts in becoming a licensee. Or during the construction permit process, either. They've been very helpful. They've provided us extensions pretty readily. (TMcCullah133, p. 7)*

Mia Lovink, a female wireless license holder told us that "*The bidding process [in the auctions] was easy. I mean it was – the FCC made it easy. Their tech support was always – you didn't have to wait at all. They were very helpful. (MLovink323, p. 6)* Her experiences with the process itself were shared by all wireless license applicants who we interviewed.

Several small licensees were of the opinion that they were under an unfair financial burden and unrealistic time constraints because they were subject to the same reporting requirements as large group owners. In contrast, other licensees, like Jose Molina, a Hispanic radio and television licensee, believed that if one does what the FCC requires, he'll have no problem.

> *Oh, the FCC, [I've] got no problems with them. You do things right the FCC is cool. You screw up, the FCC will give you a chance to unscrew it; but I['ve] never been in that situation because it is easier to do a good job and to follow the rules and the law, then to do a sloppy job and have to patch it up. (JMolina121, p. 9)*

Jose Molina, adds to his prior praise of the FCC.

> *I really like the FCC and I tell you, the FCC is not composed of a body of non-visionaries. The FCC has visionary people. . . . I am sure that they are already working very hard at fixing this situation [of the negative impact on small station owners in a consolidating market]. How they're going to do it, I haven't the slightest idea. But they know that those Americans like me who are hard working people, that don't stiff banks, no bankruptcies, nothing, you know what I mean? (JMolina121, p. 20)*

John Thomas, an African-American radio broadcaster found the FCC staff helpful even though he wouldn't "*say that is was necessarily easy [dealing with them].*" He did offer that "*it was understandable.*" He acknowledged that the "*people that I dealt with . . . were very clear about what I needed to do and how things were supposed to be done.*" He concludes that he has "*not had any problems with the FCC at all. My relationship has been good.*" *(JThomas277, p.. 8)*

Others, like Eduardo Caballero, another Hispanic radio and low power television station owner, were laudatory and deeply thankful for the assistance they received from the Commission's staff.

> *Well, they seem to have a great deal of understanding of the problems that a minority individual with limited resources had to meet the deadlines. Because they give you a [construction permit] for a limited period of time and you are supposed to build within that time. But then if you don't, you have to go back and say I need an extension. And if*

you don't [again,] you have to go back and ask for another extension. And then at one point they are going to tell you show me that you're doing something to build the station in order to give you an additional extension, and they would understand that I was building one station and that my resources did not allow me to build another station at the same time.

So I would go there and say, "(T)his is what I'm doing. I'm building the station in Bakersfield, but these other 11 construction permits are about to expire and I don't have a way to build at the present time. I don't want to lose them. This is something I always wanted to do; I always wanted to have." And they will get back to me and say, well, show me that you are serious about your efforts. And I will go there and I will show them that I signed a contract to lease equipment or to buy a piece of equipment, and they were extremely helpful in understanding.

And actually, I have to praise particularly a gentleman. He is in the Mass Media Bureau. . . . And most people in there have been, as I say, very, very understanding of our difficulties and our problems. [This gentleman] is a supervisory engineer of the low power television branch of the Mass Media Bureau. That man will have my eternal gratitude for being so understanding. And I feel very good telling you that the FCC must be proud of having somebody like him there. (ECaballero124, pp. 15-16)

(b) FCC Inaction When Confronting Private Discrimination

According to many interview subjects, historically, some individuals at the FCC have tried to reduce market entry barriers for small, women- and minority-owned businesses, but have encountered Commission-created obstacles and difficulties. Had these obstacles been non-existent, women- and minority-owned businesses might very well have been able to gain financial and managerial strength, thus better preparing them to compete successfully within the framework of today's marketplace.

The FCC instituted several successful programs, like the tax certificate program, to increase the opportunities for small, women-and minority-owned businesses. However, it appears that in some instances the FCC chose to ignore discriminatory practices in the primary and secondary market for licenses.

Rev. Everett Parker provided his insights into the historical challenges facing those who tried to overcome discrimination and provide a fair opportunity for small, minority- and women-owned businesses before the FCC. He told us, "Oh, sure I've seen discrimination [at the FCC]. I've never won a vote at the FCC. The only time I've ever won anything at the FCC was when we sued them. He has been extensively involved in civil rights issues as they impact broadcasting – both licensing and employment. He shared two of his experiences with the FCC.

(W)hen the Civil Rights Act and the effort to protect minorities in particular came along, I looked at the stations throughout the South and we decided that we should do something

about the mistreatment of Blacks by stations in the South. And the first thing we did was to ask the NAB – Governor Collins was then the head of the NAB – to ask their [member] stations to treat Blacks the same way they treated Whites, to use courtesy titles [e.g., Mr. Or Mrs.] and to give them the opportunity to present their views, especially [on] Brown v. The Board of Education. . . . Collins wanted to do that. But the board of the FCC flatly turned us down. (EParker504, p. 3)

Rev. Parker went on to tell us about a license renewal battle he fought with the FCC and ultimately won.

We went down to the South and looked at stations and picked WLBT in Jackson and the Channel 13 also, the two stations in Jackson, because they were the stations which were owned by Newhouse in Birmingham and which we later went after and got Newhouse out of the broadcasting business. . . .

And we went to Jackson because it's the college there, Tougaloo College, which was being attacked every day on WLBT. And we monitored for a week and then we petitioned the FCC – everybody thinks that we were after the license or something. But we petitioned the FCC to have a hearing knowing full well that they would not accept public information, that they would send it to the station and the station would say, "I didn't do it," or "I'll stop doing it," and then they would send you the mimeograph sheet and would put it in the file that we looked at.

And we filed a bill of particulars with the FCC instead of filing the information. We told them the things that we thought they should look at in a review of license renewal. Already the station had been in trouble with the White House. And so we filed a bill of particulars the way you would in a federal court, which the FCC had never done before. And of course, the station came back and said throw them out, they didn't put in 21 copies, which you had to put in in those days, and all the other things.

The FCC wrote us back the usual stuff. And at that point we presented our proof, and they didn't know what to do with it and they sat on it for a year. And then they renewed the license at Channel 13 and they gave WLBT a one-year renewal, knowing full well that they'd come back at the end of the year and they'd get their license and that the public would say look what we did.

And they had no thought that we would go to court. But, of course, that's what we did, and we got this landmark decision by the circuit, written by Burger.[39] *You know, it was*

[39] In *Office of Communications, United Church of Christ* v. FCC, 425 F. 2d 543, 549 (D.C. Cir. 1969), then-Judge Burger stated that "The [Hearing] Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors and their efforts. The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to

> *the most conservative panel that you could get on the circuit. And we then had to have the hearing, and it was held in Jackson. And we presented our evidence there and, of course, the hearing examiner, which he was called in those days, absolutely paid no attention to our stuff and he made so many errors that the court – when the commission renewed the license and we again appealed to the court, which had kept jurisdiction, the court dispersed it and the court, for the very first time, lifted the license. It didn't send it back to the FCC for further action.*
>
> *So that's the story of how and why we did these things. But as soon as we had the court decision giving the rights to the public to intervene in the affairs of federal regulatory agencies, that's when we petitioned the commission in 1968 to issue EEO rules and to make the reports of the stations public, which they did after much pressure. (EParker504, pp. 2-5)*

Former Commissioner Henry Rivera shared with us the difficulties around enforcing the Commission's EEO policies.

> *There were many moves to curtail the Equal Employment Opportunity Policy in the early 80s, to do a lot of things that were not terribly favorable to minorities; and, instead to look to marketplace solutions to help them, rather than to government initiatives. I think that's the most charitable way to put it. (HRivera516, p. 4)*

He goes on to recount how the Commission handled the Multi-Point Multiple Distribution Service in such a way as to avoid overtly assisting minority ownership.

> *There was . . . a new service, called Multi-Point Multiple Distribution Service [MMDS]. . . . And initially that was supposed to be a broadcast service and the Commission was supposed to grant preferences to minorities in issuing those licenses; but they didn't want to, so what they did was they classified it as a common carrier service where the minority preferences did not apply. So that was an interesting thing. I think they did the same thing with Direct Broadcast Satellite. So there were a number of instances like that,*

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satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the commission to reconsider the examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected is this record is beyond repair.

"The Commission, itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest. We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license." See *Office of Communications, United Church of Christ v. FCC*, 425 F. 2d 543, 549 (D.C. Cir. 1969).

where the Commission was doing things to avoid overtly assisting minority ownership. (HRivera516, pp. 9-10)

Mateo Camarillo, a Hispanic owner of both radio and PCS licenses, talked of his frustration with the FCC's response to the Adarand decision as it affected the delay of the C-block auction of PCS licenses.

> *. . . (T)he Supreme Court ruling [in Adarand] did not say that you could not have those [race- and gender-based] programs; it said you had to have a justification, it be on a narrow basis, but the FCC just threw out everything. (MCamarillo375, p. 21)*

Further, David Honig, Executive Director of the Minority Media Telecommunications Council, a non-profit advocacy group for minorities in media and representing multiple civil rights organizations, shares his knowledge of the FCC's activities around the distribution of licenses for educational broadcasting, the precursor to public broadcasting as we know it today. This is an example of the FCC's enabling a state (Alabama) agency to discriminate.

> *And you look . . . at the way that they handed out the public television and public radio licenses in the country. This is before the Carnegie Commission report in 1967 which sort of created what we now know as public broadcasting. Then it was called educational broadcasting.*
>
> *One of the main purposes [of the educational broadcasting licenses] was to train people who would then go out and work in commercial broadcasting, and the schools were much more prominent among licensees than they are now.*
>
> *Well, state agencies also were granted some of these licenses. All of the television licenses for public TV in the state of Alabama were given to something called the Alabama Educational Television Commission, between 1958 and 1962. And the agency was a branch of the Alabama State Government. And it's members were appointed by the governor of Alabama, George Wallace. So you have to assume that the FCC had heard of George Wallace, seen him standing in the schoolhouse door and had actual notice of what he was going to do with the television stations and who he would allow to work there, and thus who was going to get the training in Alabama to be able to qualify someday to get a bank loan as an experienced broadcaster to apply for and obtain a commercial broadcast license. This must have occurred to [the FCC].* [40]

[40] In *Applications of Alabama Educational Television Commission*, 50 FCC 2d 461 (FCC 1975), the FCC held that Alabama Educational Television stations engaged in discriminatory practices because they had few minority performers. The FCC specifically held "while it is true that there is no evidence that direct orders were ever issued to discriminate on the basis of race, the absence of such evidence is hardly dispositive. A policy of discrimination may be inferred from conduct and practices which display a pattern of under-representation or exclusion of minorities from a broadcast licensee's overall programming." Radio Station WSNT, Inc., 27 FCC 2d 993 (1971). In light of the facts of the record set forth below, we find a compelling inference that [Alabama

> *. . . (W)e took a look at . . . state and public colleges and when the colleges got their licenses, because often the state college systems in Texas and Maryland and Mississippi and Alabama and Florida and so on would apply for public broadcast licenses for the White schools, not the Black schools. So [the Black schools] got them like ten years later and [the stations] were much lower power [than the ones for the White schools].*
>
> *I mean the University of Maryland got one way before [Historically Black Colleges] Bowie State or Morgan State did. Cochran still doesn't have one. Coppin State in Baltimore was running a broadcast program with no school, I mean can you imagine trying to run an airline program to train pilots and they don't have an airplane? They've got to train [solely] on simulators? Or medical school that doesn't have cadavers, they have to train on models? How would you like to be operated on by a doctor like that? Actually, managing to keep the school going there with no broadcast license. I mean there's nothing [that] substitute(s) for the immediacy and unpredictability of . . . what happens when you're on the air live and you can't turn it off and say sorry, we have to pause and figure out what to do. There's no substitute for that.*
>
> *And that's why when the Commission rubber stamped these applications, the question shouldn't be what were they thinking? The question should be, they were thinking and they didn't care. It was an entirely predictable consequence. They were basically ratifying and validating the decisions of segregationists public and private. (DHonig521 #2, pp. 6-7)*

Mr. Rivera explains that the Congress and the courts have often impeded the FCC's efforts to increase opportunities for small, minority, women-owned businesses.

> *. . . (A) lot of the things that I suggest[ed] earlier that have happened to minorities and small businesses and women have happened as a result of things external to the Commission. You add in [a few FCC Chairmen] ... who have been very concerned about fostering minority ownership, but have had the pins knocked out from under them, basically. And it's very difficult for a, I mean, there's not much that could have been done that has not been done at the FCC up to this point in the last two [White House] administrations. (HRivera516, p. 15)*

Mr. Rivera's perspective is shared by Benny Turner, an African-American owner of radio and television licenses, recognizing that the FCC operates in a world influenced by political realities and the courts. He believes that the FCC hasn't *". . . been very effective [in helping minorities]. I think [that's in] large part a result of the decisions rendered by the courts and actions taken by Congress that seem to have the effect of limiting the authority of the FCC to be more aggressive in leveling the playing field. (BTurner108, p. 10)*

Educational Television] followed a racially discriminatory policy in its overall programming practices during the license period. *See In Re Applications of Alabama Educational Television Commission,* 50 FCC 2d 461 (FCC 1975).

(c) Policies and Processes

Some interviewees discussed the time-consuming nature of FCC practices and procedures. The longer it takes to get a decision from the FCC, the more money it costs for attorneys, engineers, trips to Washington, D.C., etc. – money that generally cash-strapped small businesses can ill afford. Henry Rivera describes the situation this way:

> *No, I never did [think anyone at the FCC was intentionally slowing things down so people who couldn't afford the fight would drop out], although I think that if one were interested in being anti-minority, the Commission processes by themselves would often have [that] result. I mean it just takes a long time to get anything done at the Commission, and if you're a minority or a small business, you generally don't have the capital to finance the particular matter through to its conclusion at the Commission. It just takes a long time. There are a lot of pleadings involved and so forth, and you have to have the staying power to see your way through those proceedings. So, as I said, you didn't need to be discriminatory, you just didn't need to do anything extraordinary and the Commission processes by themselves would take their toll. (HRivera516, p. 7)*

Many people who we interviewed discussed the repeated appeals or petitions process that the FCC allowed to take place. Dennis Miller, a White male owner of wireless licenses, shared his perception that two competitors of his abused the petition process to gain competitive advantage over him.

> *There have been two instances where people—this is a personal opinion now . . . where people have abused the process. Filing petitions to deny the transfers to our company, only in one case, the settlement papers say one thing, the other issue, the real reason was they wanted a lower roaming rate, and they knew by filing that petition to deny [our license] it'd gum the gears up for six months at the minimum. . . . I think the motive in both cases was financial on their side to change the dynamics of a business relationship or a separate contract, roaming; being specific it was roaming. . . . (T)hey knew that we would be steadfast in closing the transaction; but what happens to you from a business perspective is once the transactions have been announced and you go on public notice at the Commission, it becomes public knowledge that company A is selling to company B. And if you can slow that process down in "never-never land" or in the middle of it, you gain a competitive advantage. (DMiller147, p. 14)*

The pace of change, especially in telecommunications and wireless technology, has also created delays in FCC decisions. As the Commission seeks to transform from rigidly service-specific Bureaus towards a New FCC[41], responsive to technological and market convergence, some new entrants contend they are bucking up against an old bureau mindset – costing scarce resources. Toni Cook Bush, co-owner of a newly-formed, multi-ethnic, all-female-owned company using

[41] FCC Chairman William E. Kennard, A New FCC for the 21st Century: Draft Strategic Plan. (visited Aug. 30 1999). <http://www.fcc.gov/21st_century.>

integrated technology to create a new television network distribution concept, discusses her frustration in trying to get the necessary approvals and licenses from the FCC.

> *So I think . . . we have two strikes against us [at the FCC]. One, that we're, you know, a small company that nobody knows, and that two, we're proposing something different than what the FCC has seen before and they have not figured out a way to treat applicants who are seeking the same resource but are in two different bureaus; how to treat them the same way. (TBush378, pp. 17-18)*

(d) Staff Responsiveness and Impact of Bureaucracy

Many of the licensees who we interviewed had direct dealings with the FCC other than the licensees usual reporting requirements and license transfer transactions. While some shared their deep appreciation for the assistance they received from various staff members and the FCC, others spoke of the difficulty they have had with the FCC including the following: non-responsive staff members, access to Commission information, access to the Commission web site, or staff members out-of-touch with the small broadcasters' condition.

Rev. Everett Parker, who has a long history of dealing with the FCC, has a different perspective on staff assistance and FCC structure.

> *. . .(W)e could get a lot more help from the staff at the FCC than we get. You know, you make decisions at the top and nothing happens at the bottom. Remember what Eisenhower said, "I push all these buttons and nothing happens." So, no, the FCC is not set up to go out and see what the public needs and try to do something about it. (EParker504, p. 28)*

James E. Wolf, Jr., who has had multiple problems maintaining his radio interests, shared one of his *"many challenges with the FCC."*

> *I'm going to tell you. I had so many challenges with the FCC, even when somebody required that I move off of my signal. But I used to be at 95.9. They forced me down to 95.7 to accommodate their power increase. When they did that, you know, it brought a short spacing to the west of my signal, which meant that we were relegated to a 6,000 watt station.*
>
> *And I was trying to get my power raised. So just like the [other] adversities [I spoke about] – the FCC was always, "we don't care as long as we serve more people," . . . in this case it was [metropolitan] Illinois, to be able to serve more people. . . . And so when they did that it brought frustration on my behalf, you know, because I got boxed in and I could never raise my power up. And I thought we are always going to be a small signal, small station. . . .*

I got reimbursed just the other day. And this has been going on since 1993. I just got – not total reimbursement, but I just got some money, . . . (f)or the move that I had to make to accommodate the station. I made the move back in 1996, you know. I mean, I haven't even cashed the check. I've still got it. I just got it the other day.

[I had to go through] (l)itigation – and what really, really bothered me is the FCC said you guys settle this out of court here. This is not an FCC matter. They sent documents, papers, and everything, down to me. I said this is crazy. I said, you put me in this matter. But, you know, there's so much insensitivity here.

And then finally I asked them to go back and review it again. They went back and reviewed and said, well, yeah, it is an FCC matter. It was just callousness on their behalf, you know. And so they went back in and they made the [other] corporation reimburse me the money, but I didn't get nearly the money I should have gotten. They kept me strung out for half of a decade, and I only got $6,000 out of it. And I think it was just ludicrous, you know, that they operate like that. (JWolf281, pp. 28-29)

Jeffrey Hutton, a White male operating a small-town radio station, shares his concern over his perception that the FCC doesn't *'have a grasp [of small market radio],* his unhappiness with the FCC's low power FM decision and his own story about signal strength impeding his ability to compete adequately.

. . . (T)o me the FCC is a regulatory agency and they don't have a grasp, they preach small market radio and then they go and do this thing with all these little micro-stations [low power FM]. They don't have a clue how it works in real life. They're bureaucratic businessmen and women sitting in Washington that don't get out in the field and they don't know how it works.

So let me just give you a good example. I'm in a town that has a population of 600. ... (I)t was probably my fault because I didn't know how to do proper due diligence, but this station cannot be upgraded. Okay, logically, for me to be able to have a better station I have to be able to broadcast with more power from a higher antenna, so I can reach more of an area, so I can go out to try to sell more advertising to more people. Well, because of the spectrum spacing rule of the Commission, I can't do that. I'm locked out.

Now they'll turn right around you know and allow a station in a big market to increase its power which is somewhat ridiculous because you know everybody lives within just a small radius there. They can hear the station fine. But that kind of activity blocks out the smaller stations like me so, you know, I have to, literally, it's a day-to-day struggle to survive with this radio station because I don't have any power. I get walked all over by these bigger stations in towns far, far away from here that interfere with my signal so I can't even serve the county I'm in. There are portions of the county that can't hear me because we're only a 6,000 watt station. And I find that very frustrating.

> *People all the time saying you are a good station, why don't you increase your power so we can hear you better and things like that, and I can't do that. So that's my biggest point of contention with the FCC from a realistic perspective, they don't have any idea what's going on out here. (JHutton385, pp. 7-8)*

Toni Cook Bush raises the issue that even though more recent FCC Chairmen have worked hard to make it *"better . . . for minorities and women . . the fact of the matter [is] in the bowels of all those Bureaus, it's the same old guys who've been doing this for 20 years. That has not changed. But you don't get to the top [of the FCC] unless you can get through some of these guys at the bottom. . . . I think that is very problematic." (TBush378, p. 20)*

Mary Helen Barro, former president of the American Hispanic-Owned Radio Association and owner of multiple radio stations, shares her views on the differences between broadcasters and FCC staff, both in terms of priorities and time frames.

> *I think the FCC truly does not listen to the small broadcasters. . . . I think they think like bureaucrats. They don't think like business people and it has hurt the small broadcaster. Whenever broadcasters have been in need, and its very common, the wheels of government are on a different timetable than private industry is on. Government thinks in terms of months and years. Private industry thinks in terms of days and weeks. And the response time often times by the FCC when small broadcasters were in need was just not timely. And it hurt small business a great deal. You don't have that problem nearly today because frankly there is little or no small business [left] in broadcasting [since the deregulation in broadcasting]. (MHBarro190, p. 8)*

(e) Equal Employment Opportunity

In 1969, the FCC issued a Policy Statement which forbade discrimination on the basis of race, color, religion, or national origin in employment practices by licensees of commercial and non-commercial broadcast stations.[42] Accordingly, each station had to establish a proactive equal employment opportunity (EEO) program. This was the first time the FCC had directly addressed the issue of race in a formal policy ruling. This Policy Statement established the Commission's right to revoke licenses and to hear allegations of EEO violations in comparative hearings.

In 1998, the D.C. Circuit Court of Appeals held in Lutheran Church – Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) that certain provisions of the FCC's radio broadcast EEO rules were unconstitutional. The Commission suspended the requirement for broadcast licensees to

[42] See *Non-Discrimination in Employment Practices*, 18 FCC 2d 240, 16 RR 2d 1561 (1969)

file annual employment reports on September 30, 1998.[43] It wasn't until Spring of 2000 that a new EEO Policy Statement was issued. These new rules are once again before the courts.[44]

Rev. Everett Parker was instrumental in pushing for the first set of EEO rules. He understood early on that meaningful employment opportunity within existing, broadcast companies was critical if women and minorities were to have a fair chance of becoming licensees. Today, more so than ever, prior experience and a significant track record of success in broadcasting is a primary determining factor for participation in the secondary market for radio and television licenses. Rev. Parker shared his recollection of the FCC's handling of the EEO reporting requirements.

> *[With] the first EEO rules, when EEO reports were turned in, the FCC didn't even open them. They threw them into boxes and took them into the library and stored them. . . . They never have examined [radio and television] stations in detail for their [EEO] performance even though they are supposed to. And you know, license renewal has always been a farce. And the staff at the FCC certainly did not want to be bothered with these hundreds and hundreds of reports and analysis.*
>
> *In the end, since we were issuing these analyses every year we made a deal with the then chairman....(H)e and I made an agreement that [we] would do the analysis and would have the figures. And as long as he was Chair everything was just wonderful.*
>
> *But then, of course, the [President] Reagan FCC came along and after that, you know, they just said they weren't going to enforce the EEO rules and the hiring and promotion of minorities and women went down again. By the time the Reagan administration came in, television, at least, was as high as any industry in having minorities and women in upper level jobs, not at the corporate level, but in the stations. (EParker504, pp. 8-10)*

Former Commissioner Rivera, who was at the FCC from approximately 1981 to 1985, experienced during his tenure that *"there were very few things that were positive at all [for women and minorities during the years that I was at the FCC]."* He especially highlighted the lack of enforcement of the Commission's EEO policy and the negative impact that had on the creation of a "*farm team,*" those individuals who should have gotten the experience needed to one day become licensees.

> *I think most of the things that happened were negative. I think that one of the things that happened that hurt a lot was the Commission's decision basically to stop enforcing its EEO policies. And there was no, I mean, clearly, I think [the then Chairman] thought that this was a bad thing to do, that it was not appropriate for the government to be sticking its nose in enforcing broadcasters to hire minorities. And, as I said, I think that*

[43] See SUSPENSION OF REQUIREMENT FOR FILING OF BROADCAST STATION ANNUAL EMPLOYMENT REPORTS AND PROGRAM REPORTS, 13 FCC Red 21998 (1998)

[44] Supra note 34.

hurt a lot, because, that's your farm team, basically. Those are the folks that you look to in the future to get into ownership. And the Commission basically—you can look through the records during that period of time and you will find very few enforcement actions that had anything to do with EEO. So it was a pretty bad time at the Commission in that regard. . (HRivera516, p. 9)

(f) Distress Sales

The 1978 Broadcast Policy Statement: Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979, 983 (1978) also created the Distress Sale policy which allowed a broadcast licensees designated for a revocation hearing to sell their broadcast station to a minority-controlled entity at no more than 75% of the station's fair market value.[45]

The FCC developed the distress sale policy. It was created at the same time as the tax certificate. Virtually none of the study participants had acquired their station(s) in this fashion as the license renewal process rarely resulted in the threat of revocation.

Richard Weaver-Bey, one of the few broadcasters who did acquire his station under the distress sale program, spoke of delays in the process which cost him scarce financial resources and advertising revenues, forced him into default on his SBA loan. After Mr. Weaver-Bey traveled to Washington, DC to meet with the Commission staff, the FCC approved his license transfer.

We were being told that the FCC was not processing [our] paperwork or whatever. And we would call down and not get answers. So we decided that we would take a trip to Washington [D.C.] and see if we [could] make some headway. . . (W)e were able to have a couple of meetings during the course of that day, one in the mid-morning and one in the late afternoon, to provide information to two of those individuals. [O]ur[license transfer] process, when we got back after that, moved along at warp speed and we were finally able to come to a closing.

So, I think what the Commission could have done at that point in time was to make sure that if there was a distress sale and that if there were buyers who were ready to close, that the Commission forced the expeditious closing of the station. And that didn't happen. So that set us back and cost us a lot of money, as well as when we did get into the station, by the time we got into the station, there were a number of advertisers that had been brought on in trade and things of that nature that were just very difficult to overcome [contracts had been negotiated, etc.] So our station was sort of behind the

[45] Lee Broadcasting Corp., 76 FCC2d 462 (1980); Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978); and Clarification of Distress Sale Policy, 44 RR2d 479 (1978).

eight ball . . . from the start, and it was very difficult in attempting to catch up, so we fell into default with the SBA loan. (RWeaver-Bey171, pp. 5-6)

(g) Comparative Hearings

The FCC used the comparative hearing process from 1945 through 1994 to award licenses when there were two or more mutually exclusive applicants for the same frequency. In 1978, the Commission formalized the use of minority and gender credits in the comparative hearing process, with the goal being to increase participation by minorities and women. This meant that if a minority or woman was a controlling member of an applicant's management team, that application was given more "points" during the hearing process. The Bechtel decision in 1993, which invalidated the FCC's integration criteria, led to the FCC's suspension of the comparative hearing process in 1994. Thereafter, the 1996 Act officially eliminated comparative hearings.

Amador Bustos, a successful Hispanic multi-station owner, speaks to the effectiveness of the comparative hearings as a means to encourage minority broadcast license ownership. *"I think that [the FCC was] well intentioned but not effective. I think that the comparative hearing was really not an effective process to try to get minorities into the hopper and into the system." (ABustos122, p. 12)*

The study participants who went through comparative hearings spoke of multiple obstacles, challenges, frustrations, and commitment during the process. The length of time and money expended to acquire a license was a real burden for these applicants. Ben Perez, a communications attorney and low power television licensee, represented many minority groups in comparative hearings before the FCC. He shared his view on the effectiveness and impact of the process on minority applicants.

> *This hearing process is horrible. It destroy[ed] the hopes and fortunes of virtually every minority applicant, doing tremendous damage, and the outcome is not more minority grants. In fact, if anything, it's probably less than it used to be. And the FCC was very good about refusing to count either the composition of applicants, minority versus [non-minority] or the composition of winners. They never, they refused to gather statistics, because they, I feel, because they knew if they quantified, then people would hold them accountable for what was happening. Claiming to be helping minorities, but the licenses are not going that way. If they quantified the Comparative Hearing, what percentage of applicants were minority? What percentage won and got licenses? The numbers would have been horrible. They did not, and they never have, and they still haven't. (BPerez540, p. 36)*

Mr. Perez saw the hearing process as a *"war of attrition."* He detailed it this way.

> *Hearings by their nature were a war of attrition. The big broadcaster who had the most players to expend and had the most appreciation of the value of the license would spend the most and wear down and defeat all the other applicants. That's another permutation*

> *of the same thing, but if they couldn't buy them out they would wear them down, and they [would] get financially exhausted. They literally financially exhausted them. And, you know, more depositions, longer trials, more appeals. And if they fought long and hard enough and this was the creed of the broadcast Comparative Hearing attorney – I could tell my client, if you're willing to fight hard and long enough, I'll win this for you. (BPerez540, p. 28)*

Ruby Unger, a White female radio licensee, primarily felt that the FCC wanted to push onto the applicants themselves the responsibility for making the decision about who would end up with the license.

> *... [What] the FCC basically wants the applicants to do is knock each other out. The FCC did not want to make a decision. They did not want to rule in anyone's favor. They really wanted to have somebody buy out the competition, you know, give them money to go away. And when the depositions were taken here in Novato preliminary to the hearings in Washington, it was very clear that our application would be the top or the second in line.... that was the general consensus. I think it was clear once the process started that – and I don't really remember who said that specifically, but it could have been my FCC attorney.... (T)he upshot is I did settle on the night before I was going to testify. And I did that because I was advised to do that by my attorney. And in hindsight it really was the best thing to do. It was really difficult. It's like being pregnant and then the night before you're going to give birth you decide, okay, I won't have this baby. It was really sad. (RUnger367, pp. 2-5)*

Mateo Camarillo, a Hispanic radio and wireless licensee, who holds a masters degree in social work, previously started a school of social work to aid his Hispanic community, has been an extremely successful multi-unit McDonald's franchisee, and was a university professor for 10 years, talked of his experience with the comparative hearings as being *"a horrible process."*

> *(T)here were multiple parties seeking that frequency, seeking that spectrum and so obviously I had an attorney, and I thought it was, a good firm; it was highly recommended to me. And we proceeded to go through the process, the comparative hearing process which, you know, meant going to Washington for hearings before the administrative law judge.*
>
> *I was not very pleased with the competency of the administrative judge, [who] shall remain nameless. . . . he would be falling asleep while people were making presentations in front of him, things that even a lay person would say, gee, what's going on? You know he would ask questions [of] presenters that already had answered the question in their presentation. Things that led you to believe, is this person awake? And so I didn't have much faith in a rational recommendation coming out of that process.*
>
> *So what eventually I did is I was able to show that of all the applicants, I was the most qualified in reference to the criteria. There was another firm out of San Francisco, who was also very tenacious and it came down in my opinion to that entity and our entity. I*

formed [my] company with two other associates and we had an S Corporation . . . three stockholders.

. . . And what I did then is I was very motivated to win and very aggressive in the proceedings and then I even hired a private investigator too because I knew [the other applicant] was lying. The applicant had lied. The top competitor had lied and I knew it. And my attorney said it's a big difference between you knowing somebody lied and proving to the FCC that they lied. And it was, and he was right. There was a big difference.

... So it was very frustrating. So I knew that the odds were, it wasn't a level playing field. And so what I eventually did, I made him an offer to buy him out, his application, which went against my grain and my principles because you know I knew I had beat him outright, but I offered to pay him what he had expended, which was the rule at that time, . . . they couldn't make a profit. They could recover what they had spent. So that's in fact what happened. Because I didn't believe that I could win, based on what had transpired, even though I was the best applicant, even though the other person, the other party had lied. So that left a bad taste.

It was a long process. It was from '81 to '85. It was four years. . . . (B)ecause we bought out the other applicant, we were kind of what you might say the only ones left standing at the OK Coral. But again, I didn't think it was a fair process. I don't think we won on merits. We shouldn't have to win, people shouldn't have to win by having the fattest wallet. We should have won based on the merits. (MCamarillo375, pp. 3-5)

Francine Rienstra, a White woman who holds an FM license in Tucson, Arizona, had a different yet no less difficult experience with her 10-year-long comparative hearing process. She encountered from one individual three appeals of the decision to award her a license. Ultimately she prevailed, but by then her resources had so dwindled that she had to engage in a Local Marketing Agreement (LMA) in order to generate the funds to build out her station. Eighteen months after the station went on the air in 1994, Ms. Rienstra sold her station to her LMA partner per their original agreement. She tells her story this way.

Initially, in 1984 I formed a company to acquire a brand new FM radio license in Tucson. It was part of the Docket 80/90 batch of licenses; approximately 700 licenses across the country were being auctioned off [distributed under comparative hearings]. I had estimated that it might take a couple of years to try to acquire that license and was prepared to go ahead and apply for a license, even if it took 2 to 2½ years, or 3 years at the outside. I figured that was worth it, and I was working another job in the meantime. [It actually took] ten years.

I sent in a letter [to the FCC]... initially ... stating that I would apply for a station should they allocate a license here. The FCC said they would allocate a license. Then they said that the . . . signal wouldn't work for a class A station. Tucson is in a valley, but it is surrounded by mountains. But we have plenty of stations here that give good signals.

And I was in competition with, initially, 40 other groups. And then by the time it got to that point where the FCC said, no, we're not going to allocate a station here, I'm thinking there are 40 other groups here that want this license and there was only one license to be allocated to this market. And if somebody doesn't say something or do something, then they're not going to allocate a license here.

I couldn't wait for everybody else to make a move, so I spent my money and had my engineer do an engineering study stating that we could get city-grade coverage for a class A station. . . . [The FCC] said that they were not going to allocate a license because you couldn't get good city-grade coverage. Based on their figures that they did from their computers, I guess, I'm not really sure, I guess from their computers. And I believe what happened is that they took the 10,000-foot mountain and said that you'd be broadcasting from below ground and couldn't get a tower high enough to get a good signal. And I said that that's not true and talked to my engineer who said that's not true, and I asked him to put together an engineering study.

And we did, and we essentially appealed to the FCC. No other group did that; I was the only one that did. And the FCC made some changes, changed the channel number and the frequency, and then they allocated us a channel number here.

So, continuing in the process, then you have to send in your application when they request that you do that, and I did, and so did 20 some odd other groups ... or no, it was more than 20, probably around 30. And then the FCC weeds them down; they weed down six months, and then you have to re-apply. They weed it down and weed it down, and every time they weed down, it takes six months to weed down. . . . (W)e all applied, and then there was some more weeding-down process based on how good of an application you put together. And in order to get the 80/90 Docket, there were certain rules that you had to follow, and the closer you stuck to those rules, the more points you got.

. . . [We were an all-woman group] and we were all local. We had not ... this was part of their parameters ... we had not owned any other broadcast entity. I had a minority in my group. I had a radio background. . . . All this time, while this whole process was going on, I'd been working for radio and television stations as a sales person and then as a sales manager. And then, we got to the point of weeding it down to [a point where] we did depositions and it weeded down, and then there were four groups, and really I was the strongest out of the four groups.

And we went to a comparative hearing in Washington, D.C. [in 1990], and that's when I was declared the winner. And then one gentleman, who had applied for many, many different stations around the country, as well as owning a couple of stations in California, had applied for this one, too, and he was part of the four remaining groups at the comparative hearings. After I had won, he appealed it.... I think he said something about my engineering wasn't right, and that wasn't true. Because the FCC denied him

and said that I was still the winner. That was six months long. He appealed it again... and I won it again. He appealed it a third time.

See, the FCC had formed some kind of a group at that time, and this was supposed to make the process easier because then it wouldn't have to go back to the FCC. Well, it did. It went through that group, and I was the winner. He appealed it back again to the FCC, and I was the winner. He did appeal it one more time, and then they said I was the winner. And in order for me to get that license on the air and to even try to get more funding, because now we had used almost all . . . of our funding . . . for attorneys, for engineers, for trips, all the research and everything else that we did. So we had used quite a bit of funding, and we were still pouring money out of our pockets. This was all out of pocket. (FRienstra360, pp. 1,6-13)

(h) Repeal of the Tax Certificate

The 1978 Broadcast Policy Statement created the tax certificate program which provided tax benefits to the seller of a media property if it was sold to a minority business. The tax certificate policy encouraged and promoted minority ownership by giving a two-year like-kind transfer tax break (a deferral) for the sale of licenses to minorities if the proceeds were reinvested in a similar communication industry. In 1995, as part of the Self-Employed Persons Health Care Deduction Extension Act, Congress repealed the tax certificate program because of alleged abuse .

This tax certificate program was the single most effective program in lowering market entry barriers and providing opportunities for minorities to acquire broadcast licenses in the secondary market. Virtually every minority broadcaster with whom we spoke commented on the program's effectiveness and recommended its reinstatement as a means to increase opportunities for minority ownership. While it did not guarantee that transactions would be consummated, the tax certificate program did motivate sellers to seek out and offer an increased number of broadcast properties for sale to minorities.

Bernadine Nash, a minority daytime-only AM radio station owner in Boston, summed up the benefits of the program and the negative impact of its repeal.

The biggest blow for us, really, has been the dissolution of the minority tax certificate. Because ...when the minority tax certificate was in existence, I actually had people approach me when they wanted to sell their radio stations because there were significant tax breaks to be derived from it. When that went away, not only did I not get phone calls, I couldn't get phone calls returned when I was inquiring about properties. I've been trying like crazy and have hit, I can't tell you how many, brick walls, and have come to the realization that in this market it is not going to happen within the framework that I imagined that it would. (BNash118, pp. 7-8)

Dorothy Brunson, an African-American UHF licensee explained the economic benefit of the program to the buyer.

> *It lowered the [purchase price]. . . . Because what happened, if you needed that crucial 20% down payment, and you only had 5%, if you got a tax certificate, and that person was able to defer those capital gains of 17 or 18 percent of tax on that money, they would then be willing to give you maybe a 10% swing [on the price of the station]. Or even 12%, if it was big enough. And that 12%, with your 5%, well, they'd give you a 20% push to be able to pull that deal out, so if you can now get 15 times cash flow [in financing], you're going to be able to manage that, because you've already got a 20% equity stake. (DBrunson105, p. 25)*

Amador Bustos, who was quoted earlier on the ineffectiveness of the comparative hearing process, said that *"(t)he only thing that was effective was the tax certificate [because it] allowed minorities, as in our case, access to get some property that we would not otherwise get, because the seller was motivated by the fact that they could defer the tax for a period of time. (ABustos122, p. 12)*

Dorothy Brunson, who commented that *"it was a travesty when the Congress overruled the Commission on the tax certificates,"* provided some statistics on the program's success.

> *(I)f you go back and look at the number of cases where I went back and I believe it was 1997, '96, you probably had about oh, I would say close to 250 properties that were owned by African-Americans, maybe with Hispanics with the radio stations and one or two TV stations in the West, we were looking at probably about 315 properties. Out of that 300, probably better than about 100, 150, were based on tax certificates.*
>
> *You have to look at some of the historical research. It was tremendous. Yeah, there were some who came in and got out, bought with tax certificates, turned around and sold [the stations]; but you're always going to have somebody who's going to abuse the system, but you don't throw the baby out with the bath. But it could have been better done if the tax certificates were regulated, and all they had to do was put a clause in that the persons who had the tax certificates, would a) have to hold [the station] for a minimum of two years, or three years and/or b) [the FCC] could have limited them - they (could) say no tax certificates over $300,000 or $400,000 or whatever, you know. But, not to just kill the whole program. (DBrunson105 p. 24)*

Henry Rivera's perspective that the repeal of the tax certificate was *"devastating"* to minorities was shared by many.

> *I think in terms of things that have happened to the minority community, clearly one of the most devastating has to have been the repeal of the Tax Certificate. I mean when we lost that, we really did lose a terrific vehicle toward increasing minority ownership. That was devastating. (HRivera516, p. 12)*

(i) Auctions

The Omnibus Budget Reconciliation Act of 1993 (which added Section 309(j) to the Communications Act of 1934) gave the FCC authority to distribute licenses through a competitive bidding process, or auctions. Initially the auctions were used only for wireless licenses. The first broadcast auction, the "Bechtel auction", took place in 1999.

The most significant difference between the auctions and the previous means of distributing licenses (comparative hearings and lotteries) is that now successful applicants, as a result of the auction bidding process, are required to pay tens and often hundreds of thousands of dollars to the FCC for each license awarded to them. The FCC at one time allocated the spectrum to qualified applicants without receiving any compensation from the applicants, now the prospective licensee with the deepest pockets wins.

For already capital-deficient small, minority- and women-owned businesses, the huge sums of money needed to both acquire the licenses and build out the systems has created an enormous barrier to entry.

To help counter the financial impact of the auctions, the FCC originally created bidding credits and later favorable financing for small businesses, with additional credits being given to minority- and women-owned businesses. The FCC set the C and F blocks of PCS spectrum aside as entrepreneur blocks with the expectation, at least with the C-block auction, that small businesses would get a head start in the market with PCS service over the larger telephone service providers who were scheduled to bid for their licenses in the subsequent A- and B-block auctions.

Unfortunately, the decision in the Adarand case prompted the FCC not only to delay the C-block auction beyond the date of the A- and B-block auctions but also to remove any special credits that had been available for minorities and woman and to extend those credits to all small businesses participating in the auction.

The delay in timing of the C-block auction, coupled with the loss of minority and women bidding credits, impaired bidding strategies, pricing estimates, and ultimately limited the opportunities for small, minority-, and women-owned businesses to get financing, meet their installment payments, and build out their systems.

But more than anything, most interviewees who offered an opinion about the auction process indicated that, because of the capital requirements of the process, small business owners would be shut out of the process and relegated, if given a chance at all, to the least desirable and therefore most affordable spectrum. Carl Davis, a wireless licensee characterized the FCC as *"a money-grubbing organization"* which *"isn't fair any longer."(CDavis322, p. 27)*

Brian Cobb, a media broker had this perspective on the auction process:

> *. . . (T)he bulk of [the wireless spectrum] is being provided to whoever pays the most money. But . . . the system got perverted when [the FCC] got greedy and started selling to the highest bidder, so all they are doing is turning over all the frequency to the largest corporations in the country. That's what's happening. I call it corporate socialism, because I'm a big fan of small business. (BCobb512, p. 32)*

Toni Cook Bush sees the auction authority as one which now drives and defines choices made by people at the FCC. *"The bottom line that I figured out from at least some of the conversations that I've had at the Commission is that they really do just want to raise money, and they view their job just to try to figure out ways to get [companies] into an auction." (TBush378, p. 27)*

Henry Rivera sees it this way:

> *The Administration . . . and the Congress like the fact that there's money being generated out of something that the Commission is doing and the Commission likes that. So, they like to be patted on the back and given attaboys and attagirls and you guys are doing a great job and you're raising all this money for the Treasury and we think you're great. ... [But] that's the ball they tend to keep their eye on rather than, you know, what can we do about helping minorities? What can we do about fostering new technology . . . but I think that their mind is not necessarily on advancing the public interest as much as it should be but rather [on] how much money can we generate from this particular auction. (HRivera516, p. 21)*

Brian Cobb asks a more fundamental question about the rationale behind the auction process.

> *They haven't had a very viable solution yet [for issuing licenses]. . . . They tried to set rules that said, okay, if a minority is involved then they get favoritism or if there is more localism. . . . So then in the [comparative hearing] process everybody was trying to eat each other, and they got tied up for years and years and years. That wasn't very good. And so the ultimate solution was to make it as simple as possible, whoever has got the most money gets the frequency; and I don't understand the rationale in that. I mean, I understand the economic rationale, but if you say it's the public frequency, why did you do that. (BCobb512, pp. 33-34)*

Frank Blount also believes that the FCC is focused now on money with little consideration of the "small business guy".

> *And the FCC, I think that this whole thing has been geared to boy, let's get the billions of dollars. But, what have they done to the small business guy? They have shut him completely out of the market. (FBlount153, pp. 23-24.)*

Carl Davis shared more of his feelings about the impact of auctions on the "rank and file."

> *Really, in my opinion, auctions are illegal...because the airwaves belong to the general pops, the general population in the United States. And why should you have to pay the Federal Government? It all belongs to the people. And . . . I don't [think] we should have to pay for those licenses. We never paid. People never paid prior to this. So essentially what happened, the bulk of the licenses were given away to people. And then all of a sudden when you bring in the rank and file, more or less, then they start charging . . . . (CDavis322, pp. 17-18)*

When the C-block auction finally took place, the result was super-inflated prices driven by a few supposedly well-financed bidders; and the belief that this was the last real chance for entrepreneurs to get a meaningful part of the wireless spectrum. The A- and B-block auctions, which had already put spectrum in the hands of the large companies, had taken place. Whatever advantage that was expected to accrue to the "entrepreneur block" by being first to market had been erased when the C-block auction was delayed.

Brian Fontes, a Senior Vice President at the Cellular Telecommunications Industry Association (CTIA), offered his perspective on the viability of C block licensees given the timing of their market entry.

> *I don't think the Commission did small businesses any great favor with the C-Block; [the C-block license holders are] the last to market - the small business, women-, minority-owned, Telco-type businesses, which were originally stated under the auction authority, and Adarand kind of wiped that out. And now it's just a small business exemption or a small business category. I mean, they auctioned off first the A-Block, then the B-Block, then the C-Block. So in terms of when these blocks of spectrum become available means that the other blocks – it's kind of last to market. And I think anybody that's last to market will have a more difficult time – one, raising capital and two, competing. (BFontes524, p.11)*

C Block licenses sold for considerably more money per population covered by the license than the A and B blocks. Many applicants either dropped out of the process early, were able to afford only much less attractive secondary or tertiary market licenses, or considerably overbid for their licenses thus rendering their business plan uneconomic. Therefore these C-Block business plans became unattractive as a financial investment either for conventional lenders, equity partners or vendors.

Many C-block licensees have been unable to meet their installment payments; many have filed for bankruptcy. In either case, they have had to return their licenses to the Commission, per the auction rules. Some C block licenses have already been reauctioned. Another block of licenses is scheduled for reauction on December 12, 2000.

Mateo Camarillo, a Hispanic wireless licensee, whose experience with comparative hearings was presented above, also shared his disappointing auction experience with us. His story is illustrative of the stories shared by many other C block participants.

> *When I became aware of [the C Block] and I found that there was receptivity to those suggestions [about preferences for minorities such as bidding credits and installment payments], and they became policy, then I decided to shift focus and I left the administration of running the radio stations to get involved in PCS and formed a company, . . . Integrated Communications Group. And we then were successful in getting investors and other parties to commit to work with us [prior to the beginning of the auction].*
>
> *Anyway, what happened is the Supreme Court ruled on a case called Adarand vs. Pena, and after that ruling came down we lost millions. All our investors went away. All our investors went away. Because [with] the FCC's interpretation of the ruling, the Supreme Court Ruling did not say that you could not have those [minority] programs, it said you had to have a justification, it be on a narrow basis, but the FCC just threw out everything and so that's why our investors went away.*
>
> *And when they in fact promulgated new rules later that year, we had committed so much time, so much energy, we went ahead and participated on a reduced scale. And despite the fact that we lost millions from our investors, we just scaled down. However, we ran into the same problem that we ran into in radio broadcasting, being in secondary and tertiary markets, we subsequently found we did bid and prevail in the auction both the C Block and F Block and obtained 11 licenses. However none were, and our strategy was along the [U.S. – Mexico] border because that was our niche, that was our strength is marketing and reaching the Hispanic market which is on both sides of the border, and we thought that gave us an advantage over you know Joe Doe company that didn't even understand that community.*
>
> *However, we had the Next Waves of the world who outbid us and drove the bidding prices out of sight, so we had to drop out in Corpus Christi, in Brownsville, in markets that were important, and so we ended up with tertiary markets.*
>
> *The problem that we eventually found out is that it was very difficult to attract investors [and to get] the attention of suppliers, the Motorolas of the world, the Qualcomms of the world, in secondary and tertiary [wireless] markets. So that was another huge problem and so we're now currently in escrow to sell our licenses because we can't raise the millions needed to [make installment payments on the licenses or build them out], that we had before Adarand.*
>
> *We had everything lined up. We had manufacturers. We had investors, we had all kinds of things. But we had so much invested in time and energy we thought that we could still make it work on a smaller scale; but we subsequently learned the hard way that people aren't interested in Timbuktus of the world. Which is where minorities tend to end up*

> *because they don't have the capital, they don't have the wherewithal to go public, to have the critical mass to have this staying power. (MCamarillo375, pp. 21-22)*

While few interviewees that were involved in the C-Block auction expressly talked about the benefit of being able to pay for their licenses using installment payments, it was apparent from their comments that this program encouraged them to participate in the auction process. The difficulties for most arose, however, with the delay in the timing of the C-Block auction due to Adarand.

As was the case with Mr. Camarillo above, lenders and investors lost confidence in the C-Block applicants and generally decided to withdraw their support. Furthermore, when the auction finally did take place, the bidding was very active, with prices escalating beyond the point of economic prudence. Many bidders, given their lack of sophistication with the industry and financing in general, used all of their available money to make the license down payment, perhaps naively expecting that since they had time until their first installment payment they would be able to raise the needed capital from outside sources. With prices for the licenses generally being higher in most markets than their business plans could accommodate, it became virtually impossible for licensees to raise the capital needed to build out their systems and make their installment payments on a timely basis. Several licensees have defaulted on their payments requiring them to forfeit their licenses.

(j) Interactive Video and Data Services (IVDS)

The FCC auctioned Interactive Video and Data Service ("IVDS") and targeted this spectrum to small, minority, and women-owned businesses. Many interviewees stated that, during the IVDS auction, they came to believe that certain necessary technology was available and carried the imprimatur of the FCC. In fact the technology did not exist and many have been unable to make use of their licenses. Realizing the problem, the FCC suspended the requirement that license installment payments be made. In some cases the FCC has refunded the installment payments made to date by the licensees in exchange for the return of the license. However, the down payments made by the winning bidders remain in the hands of the FCC.

Nancy Douglas, an IVDS licensee, talked about the basic problem with this spectrum.

> *Interactive Video and Data is what it was called, but that name now has gone by the wayside. Now they just call it 218-219, because it certainly is not interactive video, it never did do that, could not do that, [even though the FCC] said that it could. It turns out that the equipment, the amount of spectrum which is 1000 mhz of spectrum, will not even do what they said that it will do. You need a lot more spectrum to be able to do that. You need really broadband, you know. So, even that was incorrect, which is basic engineering. You know, which again shows that the FCC did something that was totally wrong. And the FCC has refused to take any responsibility for that. (NDouglas155, p. 9)*

Carl Davis, who holds five wireless IVDS licenses, among others, explains the financial impact on him of the IVDS auction process.

> *I was a winning bidder on five licenses in the IVDS . . . and subsequently put 10% down. And at that point in time, I think virtually everyone who had bid for those licenses realized that the company who had stated that they had the equipment to operate at those frequencies did not have the equipment. And at that point in time, virtually everyone who had outside financing, the financial community backed off and left us high and dry.*
>
> *. . . I had deposited for the initial down payment something like $272,000. So then the financial backing that I had at that point in time decided to back out and left me dry and I couldn't come up with the other $272,000 for the [other half of the], I believe, 20% down. . . . A lot of people got collared. I don't know the numbers totally, but a number of people did. . . . I had used my own funds for the initial down payment, but I had backing for the additional ten percent and the subsequent payments - I think it was an additional $3 million. [I had] $272,000 [of my own money in the deal].*
>
> *The Federal Communications Commission kept [my down payment]. . . . Since I didn't make the additional 10 percent down . . . they claimed that I did not uphold the agreement, and, therefore, they confiscated the license. The FCC's position has been, and still continues to be, we should have done due diligence [on the equipment and the spectrum]. And I think that's a cop out because the Federal Communications Commission is the one who incessantly tapped onto, Answer TV is what it was called, stating that they had the equipment, and the FCC was touting this around in the newspapers and through their correspondence with us. That they're equipment essentially did exist.*
>
> *However, in further research, we found that the Federal Communications Commission did not even check to see if Answer TV had the equipment. They issued the licenses based [on technology that] . . . was hypothetical.*
>
> *Altogether, with respect to IVDS, I spent a total of a half million dollars - in developing my system [with QVC] that I thought was there, hiring people to write things for me with respect to how we were going to market this thing; paying attorneys; and doing research of all sorts. (CDavis322, pp. 1-3, 11-12)*

Mr. Davis continued on to conjecture why, with the failure of IVDS, the Commission will not return licensees' down payments.

> *So I'm in contact with a lot of licensees. And they're complaining. You know even though they made a second down payment and a few installment payments, they're saying well, how come I can't get all my money back? You know, what's precluding the Federal Communications Commission from giving all my money back? There's no reason for it. And come to find out there is a reason. And the reason is this - a company called Next Wave.*

> *[They] (p)ut down half a billion dollars [for licenses in the C-block auction], on the licenses they bid for on PCS, I think it was called. And they didn't come up with the additional half, which was another half a billion. . . . So they are in default. Now because they are in default, and we're in default, the FCC doesn't want to necessarily give our money back, our down payments back because if they do, it would set a precedent and then they would get their money back, or in this case, Next Wave is attempting to, they want their down payment, but the FCC wants to really confiscate that fine and put it back on the market because now the licenses are worth about ten billion. So they can make a lot more money. And it's become a money hungry business. (CDavis322, pp. 26-27)*

Mr. Davis also reports that he has finally found a use for IVDS and the accompanying technology to make it operational. However, since he failed to pay the second half of his down payment, as reported above, the FCC has confiscated his license and is leaving him without any way to recoup his personal investment.

> *This is the public notice, [the Order], to IVDS people (and we are called 218-219 mhz service): . . . they tell you how to get your money back, that is your installment payments. If that is the case, or they give you another option, you can go ahead and continue to[pay on the] installments, and they will commence 3 months henceforth, or you can request a return of your installment payments, or you can pay off the entire loan. Now I have proposed to pay off the entire loan... But they say I don't own the license because I didn't put the additional 10% down. I have found and a number of other people have found that we can utilize the license for digital information data transfer. So now the license would at least be able to get some of our money back. And I think the price I paid was close to $4 million, for the license totally, three point seven, three point eight, something like that. I could [earn] that money back in a period of five years.*
>
> *I have gone out and I've turned over rocks and I've come up with a financing source. And they are willing to pay the FCC off. I have letters to that effect and I've sent the letters to the Federal Communications Commission and given them an opportunity to check these people's credentials and background and make sure they do have this cash; and they still deny me the opportunity to come back, give them the 10% down and pay full price for the license. (CDavis322, pp. 28-29)*

Mr. Davis concludes by sharing his perception of how the FCC specifically marketed the IVDS licenses to the small, women- and minority-owned business communities. He feels that these communities were "set up" by the FCC.

> *Well, this is hypothetical of course on my part. This is what I see happened with IVDS. I think that, it looks like to me, now this is strictly speculative, because I have no evident[iary] proof, the Federal Communications Commission set up the minority community. That is, they touted these IVDS frequencies and spectrum to be the greatest thing that happened in the world since White bread.*

And what they did was they made great efforts to reach into the community, into the so-called minority community to get them to apply for these licenses. . . . Thirty-four percent of those [who] won the licenses were of that nature [small, minority- and women-owned businesses]. Hey, really, [the FCC] just touted it like it was a great thing. You know, this is something that it gonna be a breakthrough for the so-called small business person, minority individual, and females. That this is going to be the opportunity for them to get a break in the communication industry, which will render them wealthy, essentially.

And we're gonna give them this chance to do this with this new technology and new ideas and blah, blah, blah, and they went on and they put it in the Wall Street Journal. It was in the Washington Post. It was in every newspaper I ever had, they sent out little brochures, they did everything they could to reach into the communities to get people to bid on these things. And they did it. They turned around and left a sour taste in virtually everybody's mouth. (CDavis322, pp. 33-35)

(k) Abuse of the System

Ownership programs that were designed to benefit minority- and women-owned businesses were sometimes abused by White men using women and minorities as "fronts" for their applications. They would specifically recruit women and minorities to pursue licenses using FCC minority and female programs and credits, but lacked the good faith intentions to include their "partners" in meaningful ownership or decision-making positions.

Alternately, believing that women and minorities did not have the "staying power" to put up a protracted fight for a license, other groups of White men would file applications when they believed a woman or a minority had an excellent chance of winning a license, fully expecting that sooner rather than later the woman or minority applicant would pay them off to withdraw from the selection process. This scheme was referred to as "greenmail".

Some minority and women interviewees recounted instances when they had to respond to multiple appeals of the FCC's award of their license. Carl Davis, the study participant who encountered the IVDS difficulties above, shared his story of being greenmailed in his bid for cellular licenses.

[The people who contested the awarding of the cellular license] . . . were two people out of Kentucky. [Their] last names were Peter and Moon. And then there was a so-called committee out there called Committee for a Fair ... Auction, or something [like that], I forget exactly what their names were. (T) hose were the people that were involved. And we were what they referred to as "greenmailed" at the time. Meaning they were using a technique that the FCC allowed to take place, which was nothing but Blackmail—that is anybody could file a petition to deny a license against you for whatever reason they may have thought they could have done it for.

And it's referred to as greenmail, in the sense that where it was a money-making, illegal in my opinion, concoction of somebody out there in the hyperspace or whatever you want to call it. Because if you didn't [pay them to go away], you would have to go through a hearing process at the FCC and you [would] have to secure lawyers and you [would] have to do all the things involved.

So it costs you a great deal of money just to get to that point in time, get your license awarded to you...They chose a lot of people. I wasn't just the only one. (T)hey [filed a number of complaints]. They went through an entire listing against those they felt probably would pay rather than fight. One guy was, I forgot the first names, but I can remember the last names because they were substantial to me at the time. Peter and Moon, and they were from out of Kentucky.

I ended up paying them a million dollars... Because the FCC was going to carry this thing, and carry it out for a long period of time, so I just paid them a million bucks... I spent a million dollars to pay Peter and Moon, they got $500,000 a piece. The Committee . . . for a Fair Auction, something to that effect, they got $168,000 I think it was. And the legal cost of all of this came to, because I had a contingency contract with the attorneys, they ended up getting $700,000. So all told between Peter and Moon, this Committee for Fair Auction, my lawyer and his marketing firm, who ended up getting $750,000, so all told it was close to $2 million dollars. (CDavis322, pp. 12-15)

(l) Inferior Licenses

Whether it was late market entry (in both broadcast and wireless), insufficient funds for the purchase of larger market licenses, or the perception of brokers and sellers that small businesses, especially minority businesses, couldn't afford the more powerful signal stations, small, minority- and women-owned businesses frequently ended up with inferior properties. In the interview process , we found this with minority-owned businesses more than any other demographic group.

Broadcast licensees deemed the quality of their licenses as inferior if they were in small, less populated markets; if their signal strength was weak or spotty because of geographic terrain; if they suffered interference from other stations in the area; if they had their AM station at the 1600 kHz and above, or if they were daytime-only AM stations. Inferior wireless licenses included secondary and tertiary markets or spectrum for which no viable technology exists, such as with IVDS.

As one might imagine, it is more difficult to achieve and maintain profitability with inferior licenses. Further, anything that the FCC does to limit these licensees' ability to offset the economic deficiency such as denying requests for additional power or grandfathering in older more powerful stations when rules regarding frequency interference are changed creates a further burden.

Dale Gehman, a Native American radio station owner, offered his opinion that there are *"two sets of rules"* – one for new stations and one for the older stations whose signals create interference but who are grandfathered in under newer, more stringent FCC regulations.

> *It's those that were "the power to be" years ago, and their level of what they're operating at has extreme interference, but that's okay, they're "grandfathered". But if you do a new facility, a new group, try to do something for their community, "oops," you got to meet these extreme stringent rules. As far as minorities getting in the market, there should be one rule for everybody. If this certain contour is interference, then by God it should be for everybody. And if that means lowering power on the old stations, so be it.*
>
> *Or at least go to what the worse condition is in the country, and that's the standard, because the spectrum's used up. If they were to say, okay, here's the rule, because here's what the grandfathered stations are operating at and everyone can now operate at this, then it opens up the spectrum for many more stations.*
>
> *Of course the existing broadcasters are not going to like that. They're going to say, "hey, that's terrible, there's new stations coming on." But you're holding people to two standards. You're saying, okay, minority groups, we'd like to have you in broadcasting, and we'll help train you and we'll do our EEO programs, but you really don't want to be in ownership because we're going to limit you because you have to meet these new rules while we operate under these old rules, that really there's no parity at all. It just does not make sense to me, and I don't really understand. . . . It's not right. (DGehman132, pp. 25-26)*

We already shared Mateo Camarillo's story about the C-block auction where, because his funding dried up when the ownership programs were eliminated due to Adarand, he had to significantly scale back his bidding and as a result, acquired licenses in inferior secondary and tertiary markets.

> *. . . but we subsequently learned the hard way that people aren't interested in Timbuktus of the world. Which is where minorities tend to end up because they don't have the capital, they don't have the wherewithal to go public, to have the critical mass to have this staying power. (MCamarillo375, pp. 21-22)*

We're also reminded of comments made by Cellular Telecommunications Industry Association's Brian Fontes about C block small businesses being last to market and therefore having *"a more difficult time – one, raising capital, and two, competing." (BFontes524, p.11)*

Nancy Douglas, owner of IVDS licenses, shares that *". . . there are no small minority, small business opportunities anymore. They're gone. There will not be any. [E]verything from now on that they're selling is really expensive. You know, it's like the only thing that they have left is stuff way, way up there on the (wireless) spectrum. And that's stuff's really expensive to construct. (NDouglas155, p. 19)*